

Supreme Court, U.S.

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No. 94-367

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

**GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,**

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED AUGUST 25, 1994
CERTIORARI GRANTED OCTOBER 31, 1994**

HAPP

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

March 3, 1993—

COMPLAINT; jury demand—Civil cover sheet—Appearance(s) of James Eric Vander Arend, Cathleen M. Combs, Tara Goodwin Redmond, Daniel A. Edelman as attorney(s) for plaintiff with Rule 39 affidavits (1 original and 2 copies summons(es) issued.) (Documents: 1-1 through 1-7). (rm) [Entry date 03/04/93]

March 3, 1993—

RECEIPT regarding payment of filing fee paid; on 3/3/93 in the amount of \$120.00, receipt #411036. (rm) [Entry date 03/04/93]

March 10, 1993—

AMENDED COMPLAINT [1-1] by plaintiff; jury demand (Exhibit) (is) [Entry date 03/11/93]

March 22, 1993—

RETURN OF SERVICE of summons and complaint executed upon defendant George W Heintz (Attachment). (cmp) [Entry date 03/23/93]

March 22, 1993—

RETURN OF SERVICE of summons and complaint executed upon defendant Bowman Heintz Boscia on 3/15/93 (Attachment). (cmp) [Entry date 03/23/93]

April 13, 1993—

ATTORNEY APPEARANCE for defendant by George William Spellmire, David Matthew Schultz. (rm) [Entry date 04/14/93]

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April 13, 1993—

RULE 39 Affidavit of George William Spellmire (rm)
[Entry date 04/14/93]

April 13, 1993—

RULE 39 Affidavit of David Matthew Schultz (rm)
[Entry date 04/14/93]

April 15, 1993—

MOTION by defendant for enlargement of time within which to answer or otherwise plead to plaintiff's complaint; notice of motion. (rm)

April 15, 1993—

MINUTE ORDER of 4/15/93 by Hon. George M. Marovich: Defendants' motion for an extension of time to answer or otherwise plead to 5/11/93 is granted [8-1]. Mailed notice (rm)

May 18, 1993—

MOTION by plaintiff to admit Joanne S. Faulkner pro hac vice; notice of motion. (rm) [Entry date 05/19/93]

May 18, 1993—

MINUTE ORDER of 5/18/93 by Hon. George M. Marovich: Granting motion to admit Joanne S. Faulkner pro hac vice [10-1]. No notice (rm) [Entry date 05/19/93]

May 18, 1993—

ATTORNEY APPEARANCE for plaintiff by Joanne Faulkner. (rm) [Entry date 05/19/93]

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May 18, 1993—

RULE 39 Affidavit of Joan S. Faulkner. (rm) [Entry date 05/19/93]

May 18, 1993—

MOTION by defendants to dismiss plaintiff's amended complaint; notice of motion. (rm) [Entry date 05/19/93]

May 18, 1993—

MINUTE ORDER of 5/18/93 by Hon. George M. Marovich: Plaintiff is to file answer to defendants' motion to dismiss plaintiff's amended complaint [14-1] by 6/8/93. Reply is to be filed by 6/22/93. Court will rule by mail. Mailed notice (rm) [Entry date 05/19/93]

June 4, 1993—

RESPONSE by plaintiff to defendants' motion to dismiss plaintiff's amended complaint [14-1] (Exhibits); Notice of filing. (rm) [Entry date 06/07/93]

June 16, 1993—

MOTION by defendants for an enlargement of time to answer plaintiff's first discovery request (Attachments); Notice of motion. (rm) [Entry date 06/17/93]

June 16, 1993—

MINUTE ORDER of 6/16/93 by Hon. George M. Marovich: Granting motion for an enlargement of time to answer plaintiff's first discovery request [17-1]. Discovery is stayed pending ruling on motion to dismiss. No notice (rm) [Entry date 06/17/93]

June 22, 1993—

REPLY by defendants in support of their motion to dismiss plaintiff's amended complaint [14-1] (rm) [Entry date 06/23/93]

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July 26, 1993—

MEMORANDUM, OPINION, AND ORDER (rm)
[Entry date 07/27/93]

July 26, 1993—

MINUTE ORDER of 7/26/93 by Hon. George M. Marovich: Defendants' motion to dismiss plaintiff's amended complaint [14-1] is granted. terminating case Mailed notice (rm) [Entry date 07/27/93]

July 26, 1993—

ENTERED JUDGMENT (rm) [Entry date 07/27/93]

July 28, 1993—

NOTICE OF APPEAL by plaintiff Darlene Jenkins from order [20-1], minute order [21-2] and judgment entered [22-1] (PAID \$105.00) (Attachment); Notice of filing. (gm) [Entry date 07/29/93]

July 28, 1993—

MAILED LETTER regarding jurisdictional statement unacknowledged by plaintiff Darlene Jenkins. (gm) [Entry date 07/29/93]

July 28, 1993—

NOTICE OF APPEAL by plaintiff Darlene Jenkins from order [20-1], minute order [21-2] and judgment entered [22-1] (PAID \$105.00) (Attachment); Notice of filing. (gm) [Entry date 07/29/93]

July 28, 1993—

MAILED LETTER regarding jurisdictional statement unacknowledged by plaintiff Darlene Jenkins. (gm) [Entry date 07/29/93]

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July 30, 1993—

TRANSMITTED: Short record on appeal to the 7th Circuit comprising of transmittal letter, 7th Circuit Information Sheet, copy of notice of appeal, copy of order entered 07/26/93 and copy of docket entries. (gm)

July 30, 1993—

MAILED: Copies of notice of appeal, Circuit rule 10 letter to all counsel of record with 7th Circuit transcript information sheet, jurisdictional statement letter and docket entries to attorney Daniel A. Edelman. (gm)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS,)	
	Plaintiff,)
v.)	
)	No. 93 C 1332
GEORGE W. HEINTZ; and)	
BOWMAN, HEINTZ, BOSCIA)	
& MCPHEE,)	
Defendants.)	

COMPLAINT

Plaintiff, Darlene Jenkins, complains as follows against defendants George W. Heintz ("Heintz") and Bowman, Heintz, Boscia & McPhee ("Bowman firm"):

INTRODUCTION

1. This action is brought to remedy defendants' repeated violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 15 U.S.C. §1692k(d) and 28 U.S.C. §1331. Venue is proper in this District because the acts complained of took place here.

PARTIES

3. Plaintiff is an individual who resides in Chicago, Illinois. She is a "consumer" as defined by the FDCPA, 15 U.S.C. §1692a(3).

4. Defendant Heintz is an attorney and a partner in the Bowman firm, a law firm. Both defendants have offices at 1000 E. 80th Place, Merrillville, Indiana 46410.

5. Both defendants are regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a "debt collector" as defined in the FDCPA, 15 U.S.C. §1692a(6).

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

6. Defendants regularly collect debts for, among other persons, Gainer Bank, of Gary, Indiana. Gainer Bank has a large number of customers who signed retail installment contracts for the purchase of motor vehicles. Plaintiff is one such individual.

7. Gainer Bank's contracts provided that the buyer will "keep the collateral fully insured against loss or damage," and that "if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect."

8. In fact, the insurance was "financial protection insurance" issued by a Balboa Insurance Company and which covered Gainer Bank against various types of defaults by the customer on his or her obligation, such as expenses incurred in repossessing a car from a consumer who defaulted, the failure of a customer to pay persons who performed work on the car, resulting in a mechanic's lien, and errors in perfecting security interests. The "financial protection insurance" also indemnified Gainer against lia-

bility which it might incur under federal law as a result of a breach of warranty by an automobile dealer or manufacturer (the "holder in due course endorsement").

9. The standard form contract between Gainer and its motor vehicle installment customers, including Ms. Jenkins, did not authorize any such insurance to be charged to her account. Gainer Bank could, of course, procure insurance against credit loss, as long as it did so at its own expense.

10. The insurance charged to Ms. Jenkins' account was not insurance authorized by any agreement between Ms. Jenkins and Gainer Bank and could not be honestly represented as insurance on her automobile.

11. The Bowman firm had actual knowledge of the true nature of the insurance obtained by Gainer Bank no later than April 1992. A complaint filed by the Bowman firm in April 1992 includes amounts for "recovered repossession expense" paid by the Bank's insurance. "Recovered repossession expense" is not, of course, covered by insurance protecting a car against loss or damage. It is one of the coverages provided by the "financial protection" insurance that Gainer obtained.

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

12. On July 9, 1992, Heintz wrote the letter attached hereto as *Exhibit A*, demanding payment of a debt purportedly owed by Darlene Jenkins. The contents of *Exhibit A* were intended to be, and were in fact, transmitted to Ms. Jenkins. The indebtedness consisted primarily of premiums for insurance allegedly charged to Ms. Jenkins pursuant to the language quoted above.

FILING OF COLLECTION ACTIONS DEMANDING PAYMENT OF UNAUTHORIZED AMOUNTS

13. Over the last few years, Heintz and the Bowman firm filed numerous collection actions on behalf of Gainer Bank in which the amount claimed included sums charged by the Bank, subsequent to the inception of the contract, purportedly for insurance against loss or damage to the collateral. Most resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges.

14. One such collection action demanding payment for the unauthorized insurance was filed against plaintiff.

15. While said action was filed against plaintiff more than one year prior to the filing of this action, defendants fraudulently concealed their violation of the FDCPA by misrepresenting, both in the complaint and in correspondence such as *Exhibit A*, the true nature of the "insurance" for which payment was demanded. Plaintiff had no knowledge of the truth and believed that the insurance procured was simply insurance against loss of or damage to the collateral until 1993. Accordingly, the statute of limitations is tolled with respect to the filing of a collection action against plaintiff in which unauthorized amounts were added to the balance allegedly due.

16. Defendants continued to pursue their demands for payment of the unauthorized insurance by plaintiff until a date within one year of the filing of this action.

DAMAGES SUFFERED

17. The premiums charged in each case amount to \$2,000 to \$4,000. In addition, interest is charged on the premiums.

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18. As a result of defendants' demand for payment, plaintiff has suffered mental anguish and injury to her credit.

VIOLATIONS COMPLAINED OF

19. Defendants violated the FDCPA in the following respects by sending letters, such as *Exhibit A*, demanding payment for the unauthorized insurance and filing collection actions demanding payment for the unauthorized insurance:

a. Defendants violated 15 U.S.C. §1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect any debt," and defines "unfair or unconscionable means" to include adding amounts to the principal obligation "unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

b. Defendants violated 15 U.S.C. §1692e, which prohibits "any false, deceptive or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of . . . the character . . . of any debt," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."

WHEREFORE, plaintiff requests that the Court grant the following relief in her favor and against defendants:

- c. The maximum amount of statutory damages provided under 15 U.S.C. §1692k.
- d. Appropriate actual damages.
- e. Attorney's fees, litigation expenses and costs.
- f. Such other and further relief as is appropriate.

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/s/ Daniel A. Edelman

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JURY DEMAND

Plaintiff demands trial by jury.

/s/ Daniel A. Edelman

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EXHIBIT A

Please refer to our File No.
238719

July 9, 1992

Attorney Steven Morton
Ste. 563, 221 N. LaSalle Street
Chicago, IL 60601

RE: Gainer Bank vs. Darlene Jenkins
89M1-147179

Dear Mr. Morton:

This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:

1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance add the price to the contract balance and shall be payable at the then annual percentage rate in effect.
2. This contractual default and failure to keep the vehicle properly insured happen . . four occasions. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time—November 19, 1987 through April 11, 1991 and paid therefore the amount of \$4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled and there was a return refund premium of \$347.00 which was properly applied to the account.

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3. I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of \$236.71 were due or an additional approximate \$3,000.00 was due. \$3,000.00 added to the \$4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately \$8,500.00 balance in effect at the time of repossession.

This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

If you have questions or need additional information, please be in contact with me.

Very truly yours,

/s/ George W. Heintz
Merrillville Office
Member of Indiana & Illinois Bars

GWH/dk

Enclosure

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

DARLENE JENKINS,)	
)	
Plaintiff,)	93 C 1332
v.)	
)	Judge
GEORGE W. HEINTZ; and)	Marovich
BOWMAN, HEINTZ, BOSCIA)	
& MCPHEE,)	
Defendants.)	

**DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(6)**

Defendants, GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & MCPHEE ("Bowman"), by and through their attorneys, George W. Spellmire and David M. Schultz, respectfully move this court pursuant to Federal Rule of Civil Procedure 12(b) (6) to dismiss plaintiff's Amended Complaint, and in support thereof, state as follows:

I. INTRODUCTION

The court accepts only well pleaded facts as true when deciding a 12(b)(6) Motion to Dismiss. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 432 (7th Cir. 1978). The court does not accept legal conclusions that are alleged or that may be drawn from the pleaded facts. *Id.* In this case, plaintiff attached a letter to the Complaint and to a great extent this cause of action is based on the letter. Exhibits included by reference become a part of the Complaint for all purposes pursuant to Federal Rule

of Civil Procedure 10(c) and can properly be considered by the court deciding a Motion to Dismiss.

The facts necessary to grant this Motion to Dismiss are few and are specifically pled in the Complaint. Bowman is a law firm and it was retained and file a lawsuit to recover a debt. During the pendency of the lawsuit, settlement discussions were conducted. Bowman sent a letter to plaintiff's counsel in furtherance of settlement discussions. Plaintiff now contends that the letter violated the Fair Debt Collection Practices Act ("FDCPA") because a portion of the debt owed to Bowman's client was not allowed under a certain contract. However, filing a lawsuit and pursuing settlement discussions involve purely legal activities. Therefore, the FDCPA is inapplicable to Bowman's activities and a Complaint based on the FDCPA fails to state a cause of action as a matter of law. *Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992); *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990); *Firemen's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S. 2d 950 (1991).

II. STATEMENT OF FACTS

Gainer Bank retained Bowman to file a lawsuit against Ms. Jenkins to recover a debt. (Comp. ¶ 22). The Complaint was filed more than one year prior to the filing of this lawsuit. (Compl. ¶ 23). It was based on plaintiff's failure to pay the amount owed under a contract relating to her purchase of an automobile. (Compl. ¶ 21, 22). Under the terms of the retail installment contract relating to the automobile purchase, Gainer Bank had a right to obtain insurance to cover loss or damage to the collateral if the plaintiff did not provide evidence of proper insurance

coverage. (Compl. ¶¶ 13, 14). The contract also provided that premiums incurred by the bank for such insurance could be added to the contract balance payable by plaintiff. (Compl. ¶ 14). Gainer Bank did obtain insurance for plaintiff. (Compl. ¶¶ 13, 14, 17 and Exhibit "A") When plaintiff failed to make payments under the installment contract, Bowman was retained to file a lawsuit to collect the amounts owed. (Compl. ¶ 22).

During Bowman's representation of Gainer in the litigation, it wrote to plaintiff's attorney on July 9, 1992. (Compl. Exhibit "A") The letter communicated information plaintiff's counsel requested in furtherance of settlement discussion. (Compl. Exhibit "A"). However, plaintiff now claims that the insurance Gainer purchased included additional coverages that went beyond the contractual terms. (Compl. ¶ 15 and 16).

Plaintiff contends in this action that Bowman had actual knowledge in 1992 that the insurance coverage included amounts not allowed under the contract. (Compl. ¶ 18)¹ In order to establish an alleged violation of the FDCPA, plaintiff claims that the settlement letter of July 9, 1992 was an "unfair and unconscionable" attempt to collect a debt and was a "false, deceptive or misleading representation" in connection with the collection of a debt. (Compl. ¶ 19).

¹ The allegations in paragraph 18 do not relate to the *Gainer Bank v. Jenkins* case, but to a wholly separate complaint filed by Bowman in 1992. This distinction is important so that the court does not conclude that the *Gainer v. Jenkins* case was filed in April 1992 and within the FDCPA one year Statute of Limitation. 15 U.S.C. §1692k.

III. DEFENDANTS ACTIONS DO NOT CONSTITUTE AN ACTIONABLE CLAIM UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Until 1986, any action by an attorney in connection with the collection of a debt was excluded from the FDCPA. The attorney exemption was removed in 1986. The amendment that deleted the attorney exemption was meant to close a serious loophole that allowed attorneys engaged in traditional debt collection activities to avoid the protections of the FDCPA merely because they had obtained a law degree. *Green v. Hocking*, 792 F. Supp. 1064, 1065 (E.D. Mich. 1992). The purpose of the amendment, however, was not to make the FDCPA automatically applicable to all attorney functions connected in whatever way to the collection of a debt. The FDCPA regulates traditional debt collection activities, not purely law related activities done in connection with the recoupment of a debt. This interpretation of the FDCPA is consistent with the majority of a case law addressing the issue, the legislative history to the 1986 amendment and the interpretations placed on the amendment by the Federal Trade Commission.

In this case, Bowman was involved in purely law related activities, as distinguished from typical collection activities. In a similar scenario, the defendant/attorney in *Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992), was retained to file a Complaint on behalf of a creditor. The attorney was subsequently sued pursuant to the FDCPA for falsely representing in the Complaint the amounts of the debt. The court noted that a literal reading of the definition of a "debt collector" may suggest that an attorney who files a Complaint on behalf of a creditor is a debt collector. *Id.* at 1065. However, it reasoned that a literal application of the definition would produce a

result demonstrably at odds with Congress' intent in enacting the amendment, and thus the seemingly strict language of the statute was not controlling. *Id.* The court then held that an attorney who regularly filed legal proceedings to collect a debt does not fall within the FDCPA because the attorney is involved in a purely legal task. *Id.* at 1066.

The same conclusion was reached in *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D. N.Y. 1990). In reaching the conclusion that the FDCPA did not apply to attorneys who filed suit to collect a client's debt, the court reasoned that the 1986 amendment was meant to make the Act applicable to attorneys engaged in activities traditionally carried out by debt collectors. *Id.* at 1141. Unlike the activities of a debt collector, the filing of a lawsuit² and pursuing subsequent settlement discussions are legal activities.

In *Firemen's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D. N.Y. 1990), the plaintiffs retained a law firm to file an action to compel defendants to comply with the

² The Jenkins complaint is based on Complaint Exhibit A, though there are also references to the Gainer complaint being a violation of the FDCPA. (Compl. ¶¶ 23, 29). However, the Gainer complaint was filed more than one year before this lawsuit. (Compl. ¶ 23). The FDCPA requires that a action for violation of the Act must brought within one year of the violation. 15 U.S.C. §1692k(d). An action based on the complaint thus is untimely. Moreover, filing the complaint is a strictly legal activity and therefore the FDCPA does not apply.

Plaintiff's allegations that fraudulent concealment should toll the statute of limitations is unfounded. A jurisdictional requirement for an action under the FDCPA is that the lawsuit be filed within one year of the violation. When a statute creates a new right and a statute of limitations, the Doctrine of Fraudulent Concealment is inapplicable. *United States ex rel. Nitkey v. Dawes*, 151 F.2d 639, 644 (7th Cir. 1945); 51 Am. Jur.2d Limitation of Actions §151.

terms of an indemnification agreement. In that lawsuit, defendants claimed that the attorney violated the FDCPA. The court, however, held that the Act does not reach the law firm's representation of its client in the legal proceeding because the firm was acting as legal counsel and not performing traditional debt collection services. *Id.* at 1143. See also *Concord Assets Finance Corp. v. Radbaugh*, 568 N.Y.S. 2d 950 (1991); *Catherman v. First State Bank of Smithville*, 796 S.W. 2d 299 (Tx. Ct. App. 1990) (court upheld a finding that defendants/attorneys were not debt collectors within the Act).

This interpretation of the FDCPA is consistent with the legislative history of the 1986 amendment. The amendment was designed to regulate activities such as: late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debt, frequent and repeated calls to consumers, disclosure of consumer's debt to third parties, threats of legal actions on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where this is little likelihood that such action will be taken. See H. Rpt. 99-405, 99th Cong., 2d Sess. 1-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 1755. The amendment was necessary because it was estimated that in 1985 approximately 5,000 attorneys were engaged in debt collection, compared to approximately 4,500 "lay" debt collection firms, and the attorneys were exempted from the FDCPA. *Firemen's Insurance Co. v. Keating*, 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990).

The sponsor of the amendment was Representative Annunzio and he stated that "removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys. It will not prevent them from repre-

senting interests of their clients." 131 Cong. Rep. 33, 584 (1985). After the enactment of the amendment, Representative Annunzio stated:

"Only collection activities, not legal activities, are covered by the Act. . . . The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it did not prevent creditors, through their attorneys, from pursuing any legal remedies available to them." 132 Cong. Rep. H 10031 (1986).

See also *Green v. Hocking*, 792 F. Supp. 1064, 1065-66 (E.D. Mich. 1992); *Fireman's Insurance Co. v. Keating*, 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990).

Of course, it is unnecessary to review legislative history if the statute's language is clear and unambiguous. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1029, 1030, 103 L. Ed. 2d 290 (1989). It arguably is not clear whether the term "debt collector" in the FDCPA applies to attorneys involved in litigation proceedings. The majority of the cases addressing this issue have held that the Act does not apply in such circumstance, and in reaching their conclusion have reviewed the legislative history. Nevertheless, there are a few opinions that have held the Act applicable to attorneys in litigation matters, although this clearly is not the majority view. This "split" in authority supports the view that legislative history should be reviewed.

The interpretation of the Act that attorneys involved in legal proceedings for their clients do not fall within the coverage of the Act is also consistent with the Federal Trade Commission's ("FTC") view of the issue. The FTC is the federal agency charged with administration of the Act. If a statute is silent or ambiguous with respect to

an issue, the court must defer to a reasonable construction of the statute made by the implementing agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2781-83, 81 L. Ed. 2d 694 (1984). The FTC's interpretation of the Act is that attorneys or law firms that engage in traditional debt collection activities are covered by the FDCPA, but those whose practice is limited to legal activities are not covered. See *Statements of General Policy or Interpretation, Staff Commentary On the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097, 50,100 (1988). See also *Noonan, Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices In Consumer Financial Service*, 43 Bus. Law. 1069, 1075 (1988) (the FTC's interpretation of the Act is that attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector); *Dugan*, FTC activities, 44 Bus. Law. 1419, 1424 (1989).

The cases that have held the Act applicable to an attorney are distinguishable. The attorney in the majority of those cases was involved in debt collection activities, such as sending collection letters to debtors, and were not involved in legal proceedings. For instance, in *Crossley v. Lieberman*, 868 F.2d 566 (10th Cir. 1989), the FDCPA was applied to an attorney who sent collection letters to debtors, which violated the FDCPA. See also *Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991) (an attorney who sends collection letters may be a "debt collector" within the meaning of the Act.); *Grizano v. Harrison*, 763 F. Supp. 1269 (D. N.J. 1991) (Defendant/attorney was hired by a creditor to send debt collection notices to debtors); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990) (FDCPA may apply to an attorney retained by a credit union who sends collection letters that violate the

FDCPA); but see also *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) (an attorney involved in litigation for a creditor may be a debt collector under the FDCPA); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (an attorney who pursues abusive legal activities may fall within the coverage of the FDCPA).

In this case, Bowman was retained to pursue legal activities. He filed a lawsuit and during the pendency of that case conducted settlement discussions with opposing counsel. In furtherance of the discussions a letter was sent which simply provided that a debt was owed, that its client was trying to collect the debt, and that perhaps a reasonable solution to the situation could be obtained. (Compl. Exhibit "A" ("This is a letter to follow up our recent conversation in an attempt to amicably resolve this matter. . . [H]opefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution."). This July 9, 1992 letter is the basis for this Fair Debt Collection Practices Act cause of action. However, the FDCPA surely is not designed to regulate this type of legal activity.

IV. THERE ARE ALREADY SUFFICIENT RULES THAT REGULATE THE ACTIVITIES OF LAWYERS INVOLVED IN LITIGATION

An interpretation that the Act regulates conduct of attorneys involved in litigation is unnecessary and inconsistent with existing rules that regulate attorney conduct. The United States Congress and the United States Supreme Court has already established Federal Rule Civil Procedure 11 to regulate the litigation-related conduct of attorneys and parties. The rule requires that (1) attorneys must make a "reasonable inquiry", (2) any pleading, mo-

tion, or paper submitted by an attorney must be well-grounded in fact, or (3) warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (4) any pleadings, motions or papers must not be submitted for an improper purpose. Illinois has adopted a similar rule. Ill. Rev. Stat. 1993, ch. 110, R. 137. Moreover, the United District Court for the Northern District of Illinois and the Illinois Supreme Court have both adopted Rules of Professional Conduct. These rules regulate the conduct of attorneys involved in lawyer-related activities.

If the allegations in plaintiff's Complaint are true, actions under these lawyer-regulating Rules may apply. However, the FDCPA has not been, and should not be, placed as an additional layer over these Rules in order to regulate lawyer conduct that is separate from conduct generally associated with debt collectors. See *Green v. Hocking*, 792 F. Supp. 1064, 1066, n.4 (E.D. Mich. 1992) ("irrespective of Congress' intent, bringing attorneys who perform traditional legal services within the scope of the FDCPA does not seem warranted given the numerous codes, including the Michigan Rules of Professional Conduct, . . . , that regulate the conduct of attorneys. Subjecting an attorney to the extrajudicial discipline of an action under the FDCPA may also raise a separation of powers question since attorneys in courts have been traditionally considered as officers of the court.").

V. CONCLUSION

The facts pled in this Complaint establish that no cause of action can be brought against these defendants for violation of the Fair Debt Collection Practices Act. This Complaint is based in large part on the attempts to recover a debt as expressed in the July 9, 1992 letter.

However, it is undisputed that at this time defendants were involved in litigation-related activities and not those typical of a debt collector. Accordingly, the Act does not apply in this instance and no cause of action is stated.

WHEREFORE, defendants respectfully request that this court dismiss with prejudice the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,
HINSHAW & CULBERTSON
By: /s/ David M. Schultz
Attorney for defendant
George W. Heintz and
Bowman, Heintz, Boscia
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

DARLENE JENKINS

v.

Case Number 93 C 1332

GEORGE W. HEINTZ et al

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the case is dismissed.

Date: July 26, 1993

/s/ H. Stuart Cunningham
Clerk

/s/ Frances D'Andrea
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS,)	
)	
Plaintiff,)	93 C 1332
v.)	
)	Judge
GEORGE W. HEINTZ; and)	George M. Marovich
BOWMAN, HEINTZ, BOSCIA)	
& MCPHEE,)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Plaintiff Darlene Jenkins ("Jenkins") filed suit against Defendants George W. Heintz and Bowman, Heintz, Boscia & McPhee ("Bowman") alleging that Bowman violated the Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"). Defendants are attorneys who were retained by a creditor to pursue litigation against a debtor who had defaulted on a loan. Bowman sent a letter to Jenkins' attorney in an effort to settle the pending lawsuit. Jenkins alleges that this letter constituted a violation of §§1692(e) and 1692(f) in that certain insurance charges were allegedly added to the debt which were not payable by the debtors. Defendants move to dismiss the complaint on the grounds that Bowman's filing of the suit and sending the settlement letter were purely legal activities and therefore the FDCPA is inapplicable. For the following reasons, we grant the motion to dismiss.

BACKGROUND

Defendant Heintz is an attorney and a partner in the Bowman law firm. Gainer Bank is a client of the Bowman

law firm and has a large number of customers who have signed retail installment contracts for the purchase of motor vehicles.

On July 9, 1992, Heintz wrote a letter to Darlene Jenkins detailing her indebtedness to his client, Gainer Bank, including a debt for premiums for insurance charged to Jenkins as part of her installment contract. This indebtedness arose from Jenkins' default on an automobile installment contract. Gainer Bank's contracts provide that the buyer shall keep the vehicle insured against loss or damage, and if the buyer fails to do so, the creditor (Bank) can purchase the necessary insurance to cover the vehicle. The pertinent language provides:

. . . if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, [and that] if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins claims that Defendants violated the FDCPA by sending letters demanding payment for the allegedly unauthorized insurance and filing collections actions demanding payment for allegedly unauthorized insurance. The Heintz letter outlines Jenkins' indebtedness and ends with the following language:

I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of \$236.71 were due or an additional approximate \$3000.00 was due. \$3000.00 added to the \$4,173.00 for insurance along with the late charges

on the contract along with the interest which was accruing on all the monies advanced for insurance approximately \$8,500.00 balance in effect at the time of repossession. This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

Plaintiff contends that this letter violated the FDCPA because a portion of the debt owed Bowman's client was allegedly not allowed under the contract. Defendant claims that this complaint should be dismissed because the filing of the lawsuit and the letter pursuing settlement discussions are purely legal activities and therefore the FDCPA does not apply.

DISCUSSION

When reviewing a motion to dismiss we must assume the truth of all well-pleaded factual allegations and make all possible inferences in favor of the plaintiff. *See Janowsky v. United States*, 913 F.2d 393, 395 (7th Cir. 1990); *Rogers v. United States*, 902 F.2d 1268, 1269 (7th Cir. 1990). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gorski v. Troy*, 929 F.2d 1183, 1186 (quoting *Conley v. Gibson*, U.S. 41, 45-6 (1957)).

The FDCPA was originally designed to prevent abusive actions by debt collectors. In keeping with this goal it outlines certain practices from which debt collectors must refrain. As it was originally drafted, the Act specifically excluded attorneys within the definition of "debt collectors" under 15 U.S.C.A. §1692a(6). However, in 1986 Congress amended the FDCPA to delete the attorney exclusion. Pub. L. 99-361, 100 Stat. 768. Now, the language

of the Act includes attorneys who represent creditors in debt collection actions.

Various courts have addressed the issue of whether an attorney acts as a debt collector in an array of fact patterns. A number of courts have held that the FDCPA applies to attorneys who collect debts on a regular basis. For instance, the Fourth Circuit has found that attorneys who regularly collect debts fall within the guidelines of the FDCPA. *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

In *Jones*, an attorney who was retained by banks to represent bank card divisions in lawsuits based on delinquent credit card accounts was held to be a debt collector under the FDCPA. *Id.* at 316. In coming to this conclusion, the Fourth Circuit stressed the fact that at least 70% of the attorney's legal fees were generated from the collection of debts. The court held that the attorney in *Jones* not only collected debts on a regular basis but also that the "principal purpose" of his job was to collect debts. *Id.*

On the opposite end of the spectrum exist the courts that have examined the attorney's role and have held that an attorney who regularly files legal actions for the purpose of collecting debts is not a debt collector if his primary role in collecting those debts is purely of a legal nature. *See, e.g. Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992); *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139, 1140 (S.D.N.Y. 1990); *Fireman's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D. N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S.2d 950 (1991).

We do not find that these authorities conflict with each other. The primary focus of the courts in ascertaining whether the FDCPA applies to attorneys is whether the

attorney's principal role is to collect debts. This question is not answered within a vacuum. Instead, the courts take into account a variety of factors including the percentage of debt collection compared to other legal work performed by the firm, the circumstances of the debtor in relation to the attorney, and the behavior alleged to have violated the Act.

In the case at hand, we find that the letter sent by Bowman to Jenkins does not rise to the level of a "dunning" letter as proscribed by the Act. The letter, instead, appears to set forth a rational, and calm approach to remediating a conflict between the parties. To classify this missive as the type of threatening and abusive practice which violates this Act would not correspond with the purpose behind the enactment of the FDCPA.

Legislative history illuminates the purpose of this Act. The amendment in 1986 was designed to regulate activities such as late night telephone calls to consumers, calls to consumers' employers, frequent and repeated calls, threats of legal action on relatively small amounts of debt, simulation of legal process, harassment, threats of seizure of property and the disclosure of consumers' debt to third parties. See H. Rpt. 99-405, 99th Cong., 2d Sess. 1-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 1755. A central purpose of the FDCPA is to ensure that the consumer pay the amount that is owed and is not dunned for amounts which he does not owe. Thus, §1692 precludes the false representation of any amount of a debt. The Official Staff Commentary states:

Attorneys or law firms that engage in the traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but not those whose practice is limited to legal activities are not covered.

Commentary to §803(6)-2, 53 Fed. Reg. at 50100. Representative Annunzio summed up the purpose after the enactment of the Act by saying:

Only collection activities, not legal activities, are covered by the Act. . . . The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it did not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.

132 Cong. Rep. H 10031 (1986).

It is evident from the language of the statute and the case law in this area that the FDCPA covers actions by attorneys who engage in the typical debt collecting activities proscribed by the Act. However, it is also evident that not all actions engaged in by attorneys who collect debts violate the Act. The letter before us is a level-headed and reasonable request to settle a conflict between two parties who are in disagreement regarding a debt. It is not threatening, harassing or intimidating. It was not sent to the debtor directly, but rather, to the debtor's attorney. It was not one of a long line of abusive practices, but rather a single plea for settlement purposes. We do not find that this attorney action falls within the meaning of the FDCPA.

We therefore dismiss the complaint for failure to state a claim upon which relief can be granted.

ENTER:

/s/ George M. Marovich
United States District Judge

DATED: July 26, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2861

DARLENE JENKINS,

Plaintiff-Appellant,

v.

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1332—George M. Marovich, Judge.

ARGUED JANUARY 4, 1994—DECIDED MAY 27, 1994

Before FAIRCHILD, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Darlene Jenkins sued George W. Heintz and his law firm, Bowman, Heintz, Boscia & McPhee, for violating the Fair Debt Collection Practices Act, 15 U.S.C. §1601 *et seq.* Heintz and the law firm filed a motion to dismiss, arguing that attorneys who file suit to collect debts are not covered by the Act. The district court agreed and dismissed the lawsuit. Jenkins appeals. We reverse and remand.

I. Facts

Darlene Jenkins borrowed money from Gainer Bank to purchase a car. The installment contract between the bank and Jenkins required that she keep insurance on the car until she made her last payment. If she did not keep insurance, the installment contract allowed the bank to purchase insurance for the car, and then to charge Jenkins for the cost of the insurance. Specifically, the installment contract provided:

if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins defaulted on her loan. She also stopped buying insurance for the car. The bank then purchased insurance, and hired an attorney, George W. Heintz, and his law firm, Bowman, Heintz, Boscia & McPhee, to recover the remaining installment payments and the cost of the insurance. The attorneys sued Jenkins on behalf of the bank, demanding the installment payments and a \$4173.00 insurance charge, and then attempted to settle the matter out of court.

Jenkins took issue with the \$4173.00 insurance demand. She had reason to believe that the bank did not buy simple damage and loss insurance for the car, but instead purchased a financial protection policy to insure against the possibility that she might default on the loan. She figured that she had no obligation to reimburse the bank for that type of insurance; she was only required to reimburse the bank if it purchased damage and loss insurance for the car.

Jenkins filed suit against Heintz and his law firm, alleging that their attempts to pass the unauthorized insurance costs on to her violated the Fair Debt Collection Practices

Act. Her legal theory was two-fold. First, she claimed that because the insurance charge was not authorized by the installment contract, that the attorneys violated §1692f of the Act, by adding an unauthorized amount onto the debt. Second, she claimed that the attorneys' attempt to sneak the insurance charge onto her bill amounted to a "false representation or deceptive means to collect any debt" in violation of §1692e of the Act.

Heintz and his law firm moved to dismiss. They asserted that Congress simply could not have intended to regulate normal legal proceedings under the auspices of the Act. The district court agreed, and dismissed the case. Jenkins appeals. We must determine whether the broad purview of the Act covers the type of attorney conduct described in Jenkins' complaint.

II. Analysis

We review the district court's dismissal for failure to state a claim *de novo*. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992). In conducting our review, we accept all material allegations made in the complaint as true, and we draw all reasonable inferences from the allegations in the plaintiff's favor. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992). We will affirm the court's dismissal if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Congress enacted the Fair Debt Collection Practices Act in 1977, "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e). The Act targeted common abusive debt collection practices, like late-night phone calls, §1692c(a)(1), embarrassing communications through third parties, §1692c(b), harassment, §1692d, false and mis-

leading representations by the debt collector, §1692e, and assorted other practices, §§1692f-j. Obviously, Congress did not intend to eliminate all debt collection practices, only those which it considered unfair. In its original form at least, the Act stopped short of regulating certain methods of debt collection. For instance, legal proceedings did not fall under the purview of the Act. Congress accomplished this by explicitly exempting from the definition of "debt collector," "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." §1692a(6)(F).

The attorney exemption meant that attorneys could go about the legitimate business of debt collection without the fear of being sued. But it also made attorneys an unregulated class of debt collectors. Some apparently abused this loophole and engaged in abusive debt collection practices with impunity. As the Sixth Circuit recently noted, "[a]ttorneys were advertising to creditors that they could do with impunity what other collectors could no longer do: 'late-night telephone calls to consumers, calls to consumers' employers concerning the consumer's debts,' and 'disclosure of consumer's debt to third parties.'" *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993). In 1986, Congress acted to close this loophole; it amended the Act to remove the attorney exemption.

This case presents the question whether, in the wake of the 1986 amendment, attorneys acting in the course of litigation are now included within the scope of the Act. The district court determined that even in its revised form, the Act was simply not meant to regulate attorneys acting in the course of litigation. Our *de novo* review of the district court's interpretation of the statute's meaning requires that we look first to the statute's language. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). When the statute's language is clear, the text controls. *Estate of Cowant v. Nicklos Drilling Co.*, U.S. ___, 112 S.Ct. 2589, 2594 (1992).

The Act regulates the conduct of any "debt collector." §1692a(6). The Act defines "debt collector" as "any per-

son who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another." §1692a(6). Nothing in this definition hints that attorneys in the course of litigation should be excluded. Therefore, if a plaintiff can demonstrate that an attorney fits within the rubrics of the statutory definition of "debt collector," then that attorney's conduct is regulated.

Here, Jenkins alleged in her complaint that Heintz and his law firm were "regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a 'debt collector' as defined by the [Act §1692a(6)]." The proceedings have not advanced beyond the motion to dismiss stage. Therefore, we are required to accept this allegation as true. *Scott*, 975 F.2d at 368. If this allegation is true, Heintz and his law firm fall within the statutory definition of "debt collector" and the Act regulates their conduct.

In an attempt to escape this definition, Heintz and his law firm make an appeal to common sense. They argue that the Act was never meant to reach reasonable debt collection practices, such as litigation. It was only meant to cover the seamier practices of debt collection, such as late-night phone calls and other abusive conduct. Basically, they argue—with some indignation—that they are lawyers and not mere debt collectors. But the Act makes no such distinction; it has not since the 1986 amendment eliminating the attorney exemption. Under the Act as presently written, lawyers can be debt collectors, as long as they engage in the business of debt collection.

This view comports with the Fourth Circuit's decision in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992). There the court faced the same question: whether a lawyer in the course of litigation may be considered a debt collector under the Act. The court interpreted the plain meaning of the statute, and concluded that a lawyer may be con-

sidered a debt collector, as long as he meets the statutory definition. The court was not persuaded by the lawyer's argument that there was some obvious distinction between the practice of law and debt collection: "[w]e do not accept [the lawyer's] argument that he was engaged in the practice of law, not the collection of debts. We find this to be an artificial distinction. No matter what name is applied to [the lawyer's] activities, it is clear that the 'principal purpose' of his work was the collection of debt." *Id.* at 316.

The Sixth Circuit has reached a contrary result. In *Green*, 9 F.3d 18, the court considered whether a lawyer, by filing a complaint, qualified as a debt collector under the Act. The court concluded that "[a]n examination of the [Act] in context reveals that it was not intended to govern attorneys engaged solely in the practice of law. A contrary result would produce absurd outcomes." *Green*, 9 F.3d at 21. After demonstrating how literal enforcement could interfere with normal litigation, the court proceeded to rely on legislative history to support its position that Congress never intended the Act to reach litigation activities.

As the Sixth Circuit noted, there are conceivable problems with regulating attorneys in their debt collection efforts. Unlike the Sixth Circuit, however, our analysis of the statute ends with its language; we do not reach the legislative history. It appears that by removing the attorney exemption without otherwise adjusting the statute, Congress—wittingly or not—proscribed even certain litigation-related debt collection activities. There may be abundant reasons why Congress should not regulate litigation aimed at collecting debts. But in drafting a broad statute, Congress entered all areas inhabited by debt collectors, even litigation. We must faithfully apply the law as Congress drafted it. We should not disregard plain statutory language in order to impose on the statute what we may consider a more reasonable meaning. See *Matter Witkowski*, 16 F.3d 739, 745 (7th Cir. 1994) ("Even if there were some justification for concern, courts cannot re-write statutes.").

So the Act reaches lawyers engaged in litigation. But in order for the lawyers to be subject to liability under the Act, the litigation must entail some proscribed debt collection activity. Jenkins alleged that Heintz and his law firm engaged in two proscribed activities: adding an unauthorized charge to the debt, in violation of §1692f, and using deceptive means to collect a debt, in violation of §1692e.

Section 1692f provides in part:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

The installment contract authorized the bank to purchase loss or damage insurance for the car if Jenkins failed to. It did not authorize the bank to purchase a financial protection policy to insure against default, and then to pass that cost of that policy onto Jenkins. If, as Jenkins alleged in her complaint, the attorneys charged her for the costs of a financial protection policy, the charge would not have been authorized. At the motion to dismiss stage we accept Jenkins' allegation that the attorneys charged her for a financial protection policy rather than for simple car insurance. Heintz and his law firm do not address this point in their brief. So, without more, we must conclude that Jenkins states a claim under §1692f(1).

Jenkins next claims that the unauthorized charge was false, deceptive and misleading. Section 1692e provides in part that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Again, if the facts are as Jenkins contends—that Heintz and his law firm knew the insurance charge was unauthorized, but tried to pass

it off anyway—then she states a claim. Because we are required to accept her allegations in this respect as true, we conclude that she does state a claim. Knowingly making unauthorized charges in connection with debt collection is at least deceptive and misleading.

III. Conclusion

In 1977, Congress wielded the weapon of consumer legislation against some obvious targets: late night phone calls, harassment and other abuses common in debt collection. But when it removed the attorney exemption nine years later, it expanded the statute's impact to include some attorneys engaged in debt collection litigation. We are not authorized to second-guess Congress by reading out of the statute certain intrusions we could consider unwarranted. Nor are we allowed to reconstruct the statute's plain meaning by reference to legislative history. We may only apply the law as Congress drafted it. We therefore reverse the district court's determination that the Act does not apply to attorneys in the course of litigation to collect debts. There is no longer an attorney exemption in the Act, and we cannot create one by judicial fiat. We also reverse the district court's determination that the attorneys' actions were not of the type proscribed by the Act. At the motion to dismiss stage, we accept the allegations made in the complaint as true. If Heintz and his law firm acted in the manner Jenkins alleged, then they fall within the broad scope of the Act. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit